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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 170104016-7999-03]

RIN 0648-XF138

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Disapproval of Northeast Fishery Sector IX Operational Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule.

SUMMARY: This rule withdraws approval of the 2017 and 2018 Northeast Fishery Sector IX operations plan. The Regional Administrator determined that the sector and its participants are not complying with the requirements of the approved operations plan, and that the continuation of the operations plan will undermine achievement of conservation and management objectives of the Northeast Multispecies Fishery Management Plan. This rule is intended to ensure that sector operations are consistent with approved plans for accurately monitoring and reporting sector catch to ensure that overages of a sector's allocation do not occur.

DATES: Approval of the Northeast Fishery Sector IX Operations Plan for Fishing Years 2017 and 2018 (May 1, 2017, through April 30, 2019) is withdrawn, effective November 20, 2017.

Written comments must be received on or before December 20, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2017-0016, by either of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov#!/docketDetail;D=NOAA-NMFS-2017-0016*, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to John K. Bullard, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, “Comments on the Interim Final Rule to Withdraw Approval of NEFS 9.”

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Liz Sullivan, Fishery Policy Analyst, (978) 282-8493.

SUPPLEMENTARY INFORMATION:

Background

To help achieve the fishing mortality and conservation objectives of the Fishery Management Plan (FMP), each sector is allocated annual catch entitlements (ACE) and must ensure that these ACEs are not exceeded. The Regional Administrator must approve sector operations plans in order for sectors to operate and be allocated ACE for specific groundfish

stocks. A sector's operations plan includes a detailed plan for monitoring and reporting catch and the specific management rules sector participants will abide by in order to avoid exceeding the sector's allocation, as well as a plan for how the sector will operate if an ACE is exceeded. The operations plan also includes internal sector enforcement measures for operation plan breaches and remedies, such as a penalty schedule for non-compliance with the operations plan or other actions that would jeopardize the sector's continued approval. Penalties under the plan range from a written warning or fine to expulsion from the sector.

The Regional Administrator may withdraw approval of a sector, after consultation with the New England Fishery Management Council, at any time as authorized in 50 CFR 648.87(c)(3). Withdrawal may occur if sector participants are not complying with the requirements of the approved operations plan or if the continuation of the operations plan will undermine achievement of fishing mortality objectives of the Northeast Multispecies FMP.

On March 30, 2017, Carlos Rafael pleaded guilty to all counts in *United States v. Carlos Rafael* (No. 16-CR10124-WGY). Mr. Rafael is the owner of Carlos Seafood (a Federally permitted dealer) and a fleet of Federally permitted groundfish vessels that are enrolled in NEFS 9. Mr. Rafael admitted to falsely reporting catch information (species and weight) for 13 of his vessels on dealer catch reports and vessel trip reports from 2012 through 2015. These 13 vessels operated under the sector operations plan for NEFS 9 during the period of known misreporting, and are currently enrolled in the sector for fishing year 2017. Sentencing for these violations occurred on September 25, 2017. Mr. Rafael was sentenced to serve 46 months in prison and 3 years of supervised release, and during supervised release, he is banned from working in the fishing industry. The Court also ordered Mr. Rafael to pay a fine of \$200,000 and restitution to the U.S. Treasury of \$108,929. On October 11, 2017, the U.S. District Court Judge in the

criminal case ordered the forfeiture of Mr. Rafael's interests in 4 of the 13 vessels involved in the criminal case, as well as the permits issued to those vessels.

On April 28, 2017, we published an interim final rule approving 19 sectors and their operations plans, including NEFS 9, for fishing years 2017 and 2018 (82 FR 19618). At the time, although Mr. Rafael had pleaded guilty, the criminal case was not complete and sentencing for the violations had not occurred. We provisionally approved the NEFS 9 operations plan for fishing years 2017 and 2018, and allocated ACE to the sector for 2017, pending Mr. Rafael's sentencing to allow for our consideration of any additional information regarding NEFS 9 operations. In the interim final rule, we noted that we intended to take additional action, which may include consideration of the continued approval of the sector or additional management and monitoring requirements.

NEFS 9 Composition

For fishing year 2017, there are 60 groundfish permits enrolled in NEFS 9, and Mr. Rafael is a major participant in the sector. All of Mr. Rafael's groundfish permits are enrolled in NEFS 9, and he does not have any other vessels enrolled in another sector. According to the current operations plan, 22 of the permits enrolled in NEFS 9 were expected to actively fish for groundfish. Of the remaining 38 permits in the sector, 18 are in Confirmation of Permit History (i.e. the permits are not on a vessel, but quota from these permits is available for use by sector vessels or to lease out to other sectors). The other permits in the sector are either active participants in other fisheries, or are completely inactive; all of these could begin to fish for groundfish, if granted permission by the sector, without a change to the operations plan.

Since fishing year 2011, NEFS 9 employed Mr. Rafael's daughter, Stephanie Rafael-DeMello as the Sector Manager. Prior to May 30, 2017, Mr. Rafael was the President of NEFS 9

and held a position on the Board of Directors. On May 30, 2017, the sector notified us that it had removed Mr. Rafael from the position of President, as well as from the Board of Directors. A new Board of Directors was identified, including the Board's elected officials, with only one individual in common with the Board from previous years.

NEFS 9 Operations Plan Breaches

Beyond the requirements described above to monitor and report catch, the NEFS 9 operations plan specifies that upon the Sector Manager becoming aware of an "apparent breach" in a member's compliance, the Manager will investigate. The Manager is also authorized to refer the matter to the sector's Enforcement Committee and take other actions as necessary, including potentially issuing a "Stop Fishing Order." The Manager is required to submit a weekly Trip Issue Report to inform us of any enforcement, or reporting compliance issues in the sector.

Since Mr. Rafael's guilty plea in March 2017, we received a letter on May 30, 2017, from the newly elected president of NEFS 9 concerning matters related to Mr. Rafael's criminal acts. The letter outlined changes to the sector's Board of Directors, as described above, which is also included in the NEFS 9 operations plan. In the letter, the president stated that the Board notified all sector members that NEFS 9 vessels are prohibited from using Carlos Seafood, Inc. as the primary buyer and reporting dealer for any landings. The letter also indicated that the newly constituted Enforcement Committee intended to meet to further discuss Mr. Rafael's criminal violations.

On October 5, 2017, representatives of the sector requested a meeting with us to discuss the sector, and we met with the NEFS 9 Board of Directors, the Sector Manager, and representatives from the Northeast Seafood Coalition and the Northeast Sector Service Network

(NESSN) on October 26, 2017. From that discussion, we learned that the Board of Directors, including those on the sector's newly formed Enforcement Committee, had met monthly since forming in May 2017. However, the Board of Directors indicated that no additional changes have been made to the operations of the sector beyond what was described in the May 30, 2017, letter. Similarly, the sector's annual Year-End Report for Fishing Year 2016, submitted on October 27, 2017, made reference to the steps laid out in the May 30 letter, but gave no indication that further steps had been taken. We have not received any other information from the sector.

While the steps taken that are identified in the May 30 letter are potentially positive measures, they are insufficient. The sector has not provided sufficient background information about the new Board members that would help us assess their independence or ability to govern the sector differently to ensure compliance. NEFS 9 has not provided us with any information, via the Trip Issue Report or other means, regarding any investigation by the sector to determine if any of its members or vessel operators breached the operations plan agreement. Nor has there been any indication that the Board, Enforcement Committee, or Manager have taken any sector operations plan measures to address any breach such as imposing or putting in place any liquidated damages, fine, stop fishing order, expulsion, or a requirement to post a security bond, which are potential actions included in NEFS 9's operations plan. There has been no indication of whether any measures have been put in place to ensure compliance by any vessel operators who may have assisted in the misreporting. Additionally, the sector has not provided to us any accounting of any of the potential ACE overages or misallocations. Although the new Board does provide a more independent group to which the Manager is required to report potential violations, it is not clear if the sector personnel changes fully address the Manager's

responsibility for the sector's reporting requirements, ACE monitoring, and monitoring sector members' compliance with the operations plan. Last, there have been no substantial changes in the NEFS 9 operations plan for fishing years 2017 and 2018 to prevent further misreporting by any of its members or vessel operators; however, we recognize that the Board prohibited NEFS 9 vessels from using Carlos Seafood as the primary buyer and reporting dealer for any landings.

NEFS 9 ACE Overages

If a sector exceeds its ACE in any fishing year, the regulations require that the overage be deducted from the sector's ACE in the following fishing year. Based on publically available information from the criminal case, NEFS 9 likely exceeded its ACE for multiple groundfish stocks in multiple years potentially beginning in the 2012 fishing year. Because Mr. Rafael operated as both the dealer and vessel owner with no independent oversight, he was able to coordinate the misreporting, allowing these potential overages to go undetected until now. The repeated ACE overages we are now aware of indicate that the initial allocations made to the sector at the start of the 2017 fishing year and likely other fishing years were artificially high. As a result, the sector's catch to date may already exceed what would have been an accurate allocation for this fishing year.

Based on initial analysis of the misreported catch for American plaice and witch flounder, the magnitude of some of the ACE overages could be extensive. The misreported catch information for cod and yellowtail flounder is at a species level, and additional analysis is required to apportion this catch by stock area. We intend to complete this analysis as soon as possible to determine the full extent of any overages for cod and yellowtail flounder stocks. Any accountability measures, such as assessing and deducting ACE overages incurred by the sector, would be determined in a future action. Other than the public information we have access to

from Mr. Rafael's plea agreement, NEFS 9 has not provided any information about the nature and scope of misreporting that would help us to accurately administer its ACEs.

Disapproval of NEFS 9 Sector Operations Plan

The Council discussed Mr. Rafael's violations and the conditional approval of NEFS 9 at both its June and September 2017 meetings and was encouraged to comment on this issue. On September 29, 2017, we received a letter from the Council requesting that we immediately implement the sector regulations and the NEFS 9 operations plan.

Based on our review, NEFS 9 has failed to uphold sector operations plan requirements to a degree and extent that undermines foundational principles necessary for successful sector operations. Further, the sector's corrective measures to date are insufficient. We need more information and further measures are necessary to ensure that the sector operates in a manner that does not undermine the sector program.

Accurate reporting, internal accountability, and organizational integrity are core principles of the sector system. The systematic sector and vessel misreporting over a long period of time was facilitated by an internal structure and control by a single, dominant participant combined with a lack of oversight. The weakness and vulnerability of this sector's structure was underscored by NEFS 9's lack of an adequate response once the scope and nature of these violations were revealed. To date, there appears to be persistent non-compliance with fundamental operations plan requirements along with a significantly compromised structure and lack of NEFS 9 oversight. NEFS 9's failures to manage its operations effectively appear to have led to repeated ACE overages, some of which may be extensive. These overages may be continuing this fishing year, which threatens to continue undermining the sector system and its fishing mortality and conservation controls.

Without further information or revisions to its operations plan, we are not confident that the operations plan contains measures that would provide us with current accurate information or ensure compliance with the operations plan to prevent and address future misreporting or ACE overages. The sector has not provided us with information of any action it has taken to investigate its members' compliance with the sector operations plan or any measures to address breaches of its plan. The sector has not provided any information to help us corroborate the nature and scope of the false information provided to us and its effect on the sector's ACEs. The sector has not provided us with any information about the nature and scope of vessel operator cooperation with the non-compliance, or how the sector can be assured the operators are acting in compliance with the operations plan now. The sector has made no new proposals about any new compliance measures or provided any information about actions taken by their new Enforcement Committee.

NEFS 9 has failed its primary responsibility of accurately reporting and tracking its catch and has taken only minimal, insufficient steps to ensure accurate reporting and compliance with its operations plan. This includes addressing the fraudulent catch within the sector over multiple years and for multiple stocks to ensure the sector has proper ACE allocations, which may require deducting ACE overages the sector has incurred. As a result, continuation of the sector operations plan will undermine achievement of fishing mortality and management objectives of the Northeast Multispecies FMP. Therefore, we are withdrawing approval of the NEFS 9 sector operations plan until a complete and successful accounting of what happened is provided and steps are taken to ensure the sector will operate within its operations plan. We intend to work with NEFS 9 to address their operations plan issues, which we expect will take considerable time and will require additional correspondence and meetings after publication of this rule.

Timing of Withdrawing Approval and Approval

Effective November 20, 2017, approval of the NEFS 9 operation plan is withdrawn. The sector ACE remains allocated to NEFS 9, and this action does not reallocate the ACE to other sectors or to the common pool. Without an approved operations plan, NEFS 9 is prohibited from transferring ACE to or from other sectors. Vessels that were enrolled in NEFS 9 during this fishing year are prohibited from: 1) Fishing on a sector trip and harvesting sector ACE; 2) fishing on a common pool trip; or 3) joining another sector. If a vessel enrolled in NEFS 9 has declared a sector trip, and is at sea on November 20, 2017, it must return to port immediately; the vessel is permitted to offload its catch for sale. Also, we will work with individual vessels that had previously set gillnet gear, to haul the gear as soon as practicable. Vessels that are able to fish under other permits, without declaring a sector trip or using a multispecies day-at-sea, can continue to do so.

If NEFS 9 submits a new operations plan, we would attempt to conduct a review and complete a rulemaking as expeditiously as practicable. Before we could approve a new operations plan for NEFS 9, the sector must provide us with critical information about steps taken to comply with operations plan requirements and ensure steps are taken to address the organizational and operational issues that facilitated the false reporting. Vessels currently enrolled in NEFS 9 may opt to participate in the common pool or enroll in a different sector for the 2018 fishing year, as sector rosters are set annually.

Comments and Responses

We are accepting comments on this interim final rule. In response to the previous interim final rule approving 19 sectors (April 28, 2017; 82 FR 19618), we received eight comments relating to the provisional approval of NEFS 9 for the 2017 and 2018 fishing years. The

comments came from Associated Fisheries of Maine (AFM), NEFS 9, NESSN, Portland Fish Exchange (PFEX), Sustainable Harvest Sector (SHS), two industry members, and one anonymous commenter.

Provisional Approval of NEFS 9 Operations Plan

Comment 1: NESSN commented that NMFS approval of NEFS 9 was appropriate at that time given the ongoing legal proceedings against a sector member and not the sector itself.

Other comments from AFM, PFEX, SHS, two industry members, and one anonymous commenter disagreed, stating that NEFS 9's operations plan should not have been approved for Fishing Years 2017 and 2018 given the admitted crimes of NEFS 9 sector member, Mr. Rafael. Several of these commenters elaborated on measures included in the sector operations plan that the sector may not have complied with or enforced after it learned of Mr. Rafael's actions, and that the sector should be held accountable to the actions outlined in their plan. Some also stated that NMFS' actions were inadequate in this case and that 100 percent monitoring for NEFS 9 may be appropriate.

Response: We agree that, at the time, provisional approval of the NEFS 9 operations plan was appropriate given that sentencing for the criminal violations was not complete and may have provided additional information. In the interim final rule, we noted that once sentencing is complete, we would consider all of the available information to determine whether any management action is necessary, including additional management measures or withdrawal of NEFS 9 approval.

Based on all of the available information, and now that sentencing is complete, we have determined that NEFS 9 failed and continues to fail to uphold the requirements of its operations plan. This non-compliance likely contributed to extensive overages of the sector's allocation for

multiple groundfish stocks in multiple fishing years. The degree and extent of NEFS 9's failure to uphold its operations plan requirements undermines the foundational principles necessary for successful sector operations. As a result, we determined that NEFS 9 cannot continue to operate until and unless we receive sufficient information concerning the scope and nature of the operations plan breaches, actions taken by the sector in response to the breaches in accordance with operations plan requirements, and actions that will ensure the sector currently is operating in compliance with its operations plan and within its ACEs. This includes addressing the fraudulent catch within the sector over multiple years and for multiple stocks to ensure the sector has proper ACE allocations, which may require deducting ACE overages the sector has incurred. We intend to work with NEFS 9 to address its operations plan issues and will determine the measures necessary for ensuring that the sector's operations are appropriate and sufficient for accurately monitoring and reporting sector catch.

Accurate reporting, accountability, and organizational integrity are core principles of the sector system. In this case, NEFS 9 failed its primary responsibilities. Systematic misreporting over multiple fishing years, a failure to abide by, and enforce, sector operations plan requirements, and the internal structure of NEFS 9 were all contributing factors to the persistent non-compliance of NEFS 9 operations plan requirements and likely to extensive ACE overages. Because NEFS 9 has not sufficiently addressed all of these contributing factors, its continued approval under the current operations plan is likely not adequate to prevent and address continued, or future, misreporting, or non-compliance by any of its members, and would undermine the conservation and management objectives of the Northeast Multispecies FMP.

Forfeiture of Permits Held by Carlos Rafael

Comment 2: AFM, PFEX, and two members of the industry stated that Mr. Rafael should no longer be allowed to participate in the groundfish fishery and that all his permits should be relinquished.

Response: As discussed earlier in this rule, Mr. Rafael was sentenced to 46 months of prison, 3 years of supervised release, assessed a \$200,000 fine, and required to pay \$108,929 restitution. On October 11, 2017, the U.S. District Court also ordered the forfeiture of Mr. Rafael's interest in four of 13 vessels involved in the criminal case. There may be management implications from this forfeiture that may need to be included in the NEFS 9 operations plan. We intend to discuss potential implications, if any, with NEFS 9.

This is not an enforcement action, and does not impose civil penalties, permit sanctions, or forfeitures. Any civil penalties or permit sanctions may be imposed only after adequate notice and an opportunity for a hearing before an administrative law judge in accordance with NOAA's civil procedure regulations. This rule withdrawing approval of the NEFS 9 operations plan is administrative in nature, and addresses the sector requirements of the FMP and the sector's operations plan. If NEFS 9 continues to operate under its current operations plan with only the minimal changes it has proposed, it will undermine conservation and management objectives of the FMP.

This disapproval of the current NEFS 9 operations plan in this action relates only to the sector operations plan and the sector's ability to operate without undermining the sector system. Without an approved operations plan, all of the vessels currently enrolled in NEFS 9 will be unable to operate in the groundfish fishery for the remainder of the 2017 fishing year. Unless there is an additional enforcement action that affects the vessels' permits, the sector vessels may continue to operate in accordance with their non-groundfish permits. For the 2018 fishing year,

these vessels could opt to fish in the common pool, or enroll in a sector with an approved operations plan. If NEFS 9 submits, and we approve, a new operations plan that addresses the serious management concerns discussed throughout this rule and that ensures the sector could operate without undermining the objectives of the Northeast Multispecies FMP, the vessels could re-enroll in NEFS 9.

Changes to NEFS 9 Operations

Comment 3: NEFS 9 submitted a letter outlining the changes it made in response to the pending criminal case. NEFS 9 removed Mr. Rafael from its Board of Directors and elected a new Board, created a new Enforcement Committee, and decided not to allow sector members to sell catch to Carlos Seafood, Inc. as a primary buyer.

Response: We acknowledge these actions; however, they are insufficient by themselves. There are numerous issues that must be addressed as noted in this rule that we have begun to address with the sector. We expect to continue to discuss these issues with NEFS 9 during the approval process for any new operations plan.

Classification

The NMFS Assistant Administrator (AA) has determined that this interim final rule is consistent with the Northeast Multispecies FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

This interim final rule is exempt from review under Executive Order 12866 because this action contains no implementing regulations.

The interim final rule approving 19 sectors, including NEFS 9, provided an opportunity for the public to comment on the provisional approval of the NEFS 9 operations plan. The interim final rule specified that we would consider further action, including consideration of

further management or monitoring requirements and continued approval of the sector. Pursuant to 5 U.S.C. 553(b)(B), the AA finds that prior notice and the opportunity for public comment would be contrary to the public interest. The purpose of this action is to withdraw approval for a previously approved and currently operating sector. We have determined that NEFS 9 and its members are not complying with the requirements of the operations plan, and that the operations plan is not sufficient to address the serious management issues described earlier in this preamble. The time it would take for prior notice and opportunity for public comment would allow the sector to continue to operate under a failed operations plan that is not consistent with the management and conservation objectives of the FMP. We need further information to determine the full nature and extent of any ACE overages and how they will affect NEFS 9 operations. The likely ACE overages that occurred, possibly beginning in the 2012 fishing year, suggest that the initial allocations made to NEFS 9 at the start of this fishery year may be artificially high. As a result, the sector's catch to date may already exceed what would have been an accurate allocation for this fishing year. Allowing the sector to proceed without an accurate accounting of known misreporting will undermine effective management of the sector program and could further undermine fishing mortality objectives of the FMP. Further, providing the participants in the sector with advanced notice of the disapproval by delaying the effective date would create an incentive for sector members to harvest or lease out as much of the sector's quota as possible, while operating under an operations plan that we have determined undermines the objectives of the Northeast Multispecies FMP.

Additionally, the AA finds there is good cause under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness so that the purpose of this rule is not undermined. As stated above, the purpose of this action is prevent a sector from fishing under a sector operations plan that has

been determined to undermine the objectives of the FMP, and that may be fishing under allocations that are artificially high considering the potential ACE overages that have occurred since 2012. A delay in the implementation of this rule would allow the sector to continue to operate under an operations plan that is determined to have not adequately ensured accurate reporting or compliance, and that the sector has failed to enforce. A delay in implementation would also increase the likelihood of additional ACE overages for NEFS 9 since its initial allocations for the 2017 fishing year does not include any adjustments for previous overages. As a result, continued operation of the sector further jeopardizes the objectives of the FMP and increases the likelihood that additional quota overages may occur.

This interim final rule does not contain policies with Federalism or “takings” implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

This interim final rule is exempt from the procedures of the Regulatory Flexibility Act

because the rule is issued without opportunity for prior notice and opportunity for public comment.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: November 17, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

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